

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

GRANT BIRCHMEIER, et al.,	}	
Plaintiffs,		Docket No. 12 C 4069
vs.		
CARIBBEAN CRUISE LINE, INC.,		Chicago, Illinois
et al.,		March 7, 2014
Defendants.	}	1:00 p.m.

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE MATTHEW F. KENNELLY

APPEARANCES:

For the Plaintiff: LOEVY & LOEVY
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1 (The following proceedings were had in open court:)

2 THE CLERK: Case 12 C 4069, Birchmeier v. Caribbean
3 Cruise Line.

4 MR. RAUSCHER: Good afternoon, your Honor; Scott
5 Rauscher on behalf of the plaintiffs.

6 MS. RAPP: Good afternoon, your Honor; Eve-Lynn Rapp
7 on behalf of plaintiffs.

8 MR. BALABANIAN: Good afternoon, your Honor; Rafey
9 Balabanian on behalf of plaintiffs.

10 MR. EPSTEIN: Richard Epstein on behalf of Caribbean
11 Cruise Line and Vacation Ownership Marketing Tours.

12 MR. O'MEARA: Good afternoon, your Honor; Brian
13 O'Meara on behalf of the defendant, The Berkley Group.

14 MR. BACKMAN: Jeffrey Backman, also on behalf of
15 Caribbean Cruise Line and Vacation Ownership Marketing Tours.

16 THE COURT: Have you figured out who is going to go
17 first and second?

18 MR. EPSTEIN: We have discussed allocating our time,
19 yes.

20 THE COURT: So the defendants are going to go first,
21 and the plaintiff as the moving party goes last. So you get
22 15 minutes. Anybody who is not talking can sit down. The
23 clock is running.

24 So what I want you to start off is by commenting on
25 the evidence that is discussed in the reply, the list of

1 170,000 people and the other lists that are talked about there
2 in terms of the ascertainability issue.

3 MR. EPSTEIN: Okay. That list of 179, they say it's
4 179,000. Our count is less, but it's still over a hundred
5 thousand because there's a lots of calls that do not seem to
6 be traceable. Those are calls that were actually completed.
7 Those are calls that pretty much are identifiable as having
8 been generated by one of the ESG calls.

9 THE COURT: So the class is ascertainable at least to
10 that extent.

11 MR. EPSTEIN: Basically, yes. I mean, I wasn't
12 willing to come in here and concede that. They also point to
13 a list that has 280 telephone numbers that's identifiable. I
14 think that's the third or fourth bullet point.

15 THE COURT: 280?

16 MR. EPSTEIN: 280.

17 THE COURT: I don't think --

18 170,000 or a hundred thousand, even if it's a hundred
19 thousand, that's a lot of people.

20 MR. EPSTEIN: It is.

21 THE COURT: So the class is ascertainable at least to
22 that extent.

23 MR. EPSTEIN: We haven't drilled down on the
24 mechanics of doing this.

25 THE COURT: You just said yes a second ago, and I

1 gave you a second chance.

2 MR. EPSTEIN: But we believe that the technology
3 exists that you would be able to trace those calls back. And
4 that is one of the points I wanted to make is that normally
5 when you are dealing with these kinds of issues, the plaintiff
6 comes forth with a plan to actually be able to identify who
7 the members of the class are. That's missing here.

8 THE COURT: Well, the reason it's missing is that the
9 people who were making the calls didn't keep very good records
10 apparently or any records, right?

11 MR. EPSTEIN: That appears to be the case.

12 THE COURT: Okay. So we're going to get back --

13 MR. EPSTEIN: But we weren't those people.

14 THE COURT: Well, but there's at least evidence your
15 people hired the people who hired those people --

16 MR. EPSTEIN: We hired --

17 THE COURT: -- a link or two.

18 MR. EPSTEIN: We hired them.

19 No. We entered into an arrangement with them where
20 they were making calls regardless of whether they had any
21 arrangements with us. We were providing an incentive to
22 induce their -- to improve the responsiveness of their
23 program. They testified, Mr. DeJongh testified.

24 THE COURT: If you want to spend your 15 minutes
25 talking about liability, I'm happy to do that. But, I mean,

1 is it really the contention that if I hire somebody to go do
2 something and then I kind of do this and turn away and they go
3 do something that's illegal that I'm not responsible for it?

4 MR. EPSTEIN: Well, your Honor, I don't want to
5 debate that issue. I don't want to debate liability.

6 THE COURT: You don't have to. You just have to
7 answer my question. You don't have to. You just have to
8 answer my question. So I just asked a question. What is the
9 answer?

10 MR. EPSTEIN: The answer to your question is no
11 because you're using the wrong term. We didn't hire them. We
12 have a contract with them. They were doing what they were
13 doing regardless. So as long as you use the right --

14 THE COURT: So you enter into a contract with
15 somebody to --

16 MR. EPSTEIN: We're not denying that there was
17 potential exposure. We're not denying that.

18 THE COURT: Just tell me when I can get a whole
19 question out so I --

20 MR. EPSTEIN: Please.

21 THE COURT: Okay. So you contract with somebody to
22 do marketing for you. They go out and do marketing for you
23 pursuant to the contract and they do something that is
24 illegal. You're saying that under the TCPA, you're not
25 responsible for that? If that's all true, you're not

1 responsible for it.

2 MR. EPSTEIN: We're not conceding liability or
3 conceding that anything was done illegal.

4 THE COURT: What would be the argument that you're
5 not responsible for it?

6 MR. EPSTEIN: Well, primarily is if they didn't do
7 anything illegal.

8 THE COURT: No, but let's say they did do something
9 illegal. You have a contract; you turn the other way. You
10 don't have anything to do with what they're doing. And then
11 they go out pursuant to your contract and do something that is
12 illegal under the TCPA. Is there some scenario under which
13 you, as the contracting party, wouldn't be liable if you
14 assume the facts that I have just described?

15 MR. EPSTEIN: Under a strict statutory construction
16 view which other courts, albeit not yourself, but other courts
17 have ascribed to, if the party did not make or initiate the
18 call, they are not liable. We have cited in other --

19 THE COURT: What about the FCC regs?

20 MR. EPSTEIN: The FCC, it's not a regulation. It's a
21 finding, and the regs don't speak to vicarious liability.
22 They have a pronouncement.

23 THE COURT: That's actually worse you for you, isn't
24 it? Isn't this one of these statutes where this thing called
25 the Hobbs Act applies?

1 Maybe I'm wrong. I think there is something about
2 the law in this area where an FCC interpretation in a ruling
3 is binding on district courts under the Hobbs Act. If you
4 have a problem with it, you actually have to go to the Court
5 of Appeals, and our Court of Appeals has said I can't even
6 touch that.

7 MR. EPSTEIN: You're obligated under that legal
8 principle to give deference to their interpretation, statutory
9 interpretation, of the statute under the regulations. The
10 regulations have the effect of law.

11 THE COURT: So let's get off of that --

12 MR. EPSTEIN: Let's get off of that.

13 THE COURT: -- because I actually have other
14 questions that I want to use the remainder, at least some of
15 the remainder of your time on.

16 MR. EPSTEIN: We were allocated --

17 THE COURT: I don't know -- I don't believe that I
18 understand what the status of the list of 2 million is, okay.
19 So there is something about 2 million calls that were
20 transferred to CCL, and the argument that is made on the
21 defense side is that isn't really relevant to anything. And I
22 guess my question about that is: Isn't that a subset of the
23 recipients of calls?

24 MR. EPSTEIN: Potentially in part. The testimony is,
25 and this is undisputed, that those 1.9 million transfer calls

1 include other sources. There were other programs, other out-
2 bound calling sources, that Caribbean Cruise Line used other
3 than Mr. DeJongh.

4 THE COURT: So they're not all necessarily from this.

5 MR. EPSTEIN: It's not all from this. That's the
6 testimony.

7 THE COURT: Okay.

8 MR. EPSTEIN: Some definitely will be.

9 And as you pointed out, 179,000, which would be
10 included within that 1.9 million, definitely are traceable.

11 THE COURT: Okay. And then the third thing I wanted
12 to ask about is this question about the proposition that not
13 all of the calls were political survey calls, not all of the
14 alleged calls were phony political survey calls, okay. Tell
15 me how that fits into this.

16 MR. EPSTEIN: Two different issues. There were --

17 Not all of Mr. DeJongh's calls were overtly
18 political. Some dealt with social issues; some dealt with
19 societal, you know, those kind of issues, where there is a
20 distinction under the First Amendment political speech
21 exception to the subset here of calls to residential telephone
22 lines. There's basically a noncommercial or political speech
23 kind of exception that would exempt those calls from the TCPA.
24 The question is to what -- what is the breadth of that
25 particular exception?

1 And then the other part is what we were talking about
2 just 30 seconds ago, and that is other calling programs that
3 Caribbean Cruise Line had provided its free cruise
4 certificates as incentives that were done by completely
5 different people that had nothing to do with ESG. Those were
6 political; those were social. You know, they could be talking
7 about, you know, social policy issues, a variety of different
8 things.

9 THE COURT: Okay. What else would you like to tell
10 me?

11 MR. EPSTEIN: Your Honor, I think we'll circle back
12 to kind of where you started with 179,000 and what is
13 basically wrong with that. This case -- I think it's
14 noteworthy that this case started with hysterical ranting by
15 the plaintiffs about scams and shell companies, you know, and
16 straw men that Caribbean Cruise Line and the rest of the
17 defendants set up Mr. DeJongh in business. What is
18 interesting is that all of that rhetoric that you find in the
19 consolidated complaint, the first amended complaint, the
20 original complaint, is nowhere to be found in the motion for
21 class certification.

22 THE COURT: So why are you even talking about it?

23 MR. EPSTEIN: The plaintiffs are abandoning that
24 theory.

25 THE COURT: Why are you even talking about it? If it

1 were me and I had 15 minutes, I wouldn't talk about things
2 that you by definition are telling me are not at issue
3 anymore. By the way, you have used eight.

4 MR. EPSTEIN: Are you permitting an amendment where
5 none has been requested? The motion --

6 THE COURT: I'm dealing with a motion for class
7 certification.

8 MR. EPSTEIN: Right, and the motion -- I'm sorry.

9 THE COURT: I'm dealing with a motion for class
10 certification that asks me to certify two, a particular
11 class -- I think it's two. Okay, that's what I am dealing
12 with.

13 MR. EPSTEIN: And the motion for class certification
14 tracks what the original class defined in the complaint was,
15 which was roughly, you know, everybody in America who received
16 one of these phone calls. The only testimony you have is that
17 there was as many as 50 million of these calls. And our view
18 is very simple, is that that's the motion that the Court
19 should be ruling on. That motion --

20 THE COURT: So you're saying that I don't -- I
21 can't -- it's inappropriate for me to say, okay, if we can
22 ascertain 174- or 179,000 people, then I will certify a class
23 on the people we can ascertain? I can't do that?

24 MR. EPSTEIN: You can do that if it had been properly
25 presented that way.

1 THE COURT: Please. Have you read Rule 15 in the
2 last 50 years?

3 MR. EPSTEIN: Except for one thing, your Honor.
4 There's been no request made.

5 THE COURT: It doesn't have to. It can be done after
6 the fact.

7 MR. EPSTEIN: The motion that was originally filed to
8 which we have the only chance to oppose didn't address that as
9 a possibility. It was only in the reply does that come up.

10 And it's prejudicial, I think, to the defendants, you
11 know, for some class that has not been fully vetted out, you
12 know, to be considered by the Court. Obviously you're not
13 appreciative, you know, of the fact of the status of the
14 pleadings here.

15 THE COURT: I just think it's -- I'm trying to grope
16 for a nice word here -- it's just not a winning argument.

17 I mean, there is no rule, and you can't quote me one,
18 that says that the motion for class certification has to track
19 what the complaint says. You can't. It's just not doable.
20 You know, and you got the opportunity for oral argument here.
21 You have squandered your 10 minutes. Okay. You have used all
22 10, and now we're working on 11. And, I mean, you raised this
23 issue of ascertainability in the response. So the plaintiffs
24 dealt with it in the reply. They said, well, we can at least
25 ascertain the 174, we can maybe ascertain the 2 million, we

1 can maybe ascertain something else. And so I'm asking a
2 question, and then you basically start talking to me about how
3 it's an unfair amendment of the complaint. I'm not dealing
4 with the complaint. I'm dealing with the motion.

5 So who is going to use the other five minutes? Is it
6 you or somebody else?

7 MR. EPSTEIN: Well, if you're drilling down the 174,
8 I don't have any argument as to ascertainability there. We
9 have arguments as to 50 million.

10 THE COURT: You know what, you said that in the first
11 30 seconds, and you have used the other nine and a half.

12 MR. EPSTEIN: Well, if you --

13 THE COURT: Wow.

14 MR. EPSTEIN: -- are excluding 50 million --

15 THE COURT: I'm not.

16 MR. EPSTEIN: -- as a possible class.

17 THE COURT: I'm asking questions, okay. I had a
18 question about that because I acknowledged the fact that, you
19 know, the 174 wasn't something you had addressed yet, and so I
20 gave you an opportunity to address it. You addressed it
21 quickly. You said that that's ascertainable. And, you know,
22 I've asked you what else you had to tell me. Then you start
23 talking about the rhetoric that isn't even in this motion.

24 So now you're down to three minutes.

25 MR. EPSTEIN: I will let Mr. O'Meara have the

1 remaining time to speak on behalf of Berkley. Thank you, your
2 Honor.

3 MR. O'MEARA: Good afternoon again, your Honor; Brian
4 O'Meara on behalf of The Berkley Group.

5 Mr. Harrison wanted to be here from North Carolina.
6 His dad suffered a stroke.

7 THE COURT: I'm sorry to hear that. Please pass on
8 my sympathy.

9 MR. O'MEARA: I will do.

10 Briefly, your Honor, just in terms of the class
11 definitions themselves as they apply to Berkley, our issue is
12 with -- if you look at the definition, it is phone calls made
13 by, on behalf of, or for the benefit. Clearly, Berkley --

14 THE COURT: I don't think that's a terribly great
15 argument either because you're basically --

16 And I understand that it's clear, absolutely clear,
17 that I have to -- I can't just look, you know, at the bare
18 allegations of the class certification motion. But I don't
19 think that I have to do a class that parses the people out
20 defendant by defendant. It's people who received phone calls.
21 You know, there's at least some basis to think that these were
22 all being done, you know, by one or a group of entities that
23 were maybe acting for different people, and maybe then there's
24 a question ultimately of who is responsible for what part of
25 it, but I don't think I have to parse that out.

1 I actually had a different question for you. So here
2 is my question. So you have got a situation here -- and just
3 we'll call this a hypothetical so that nobody has to concede
4 anything. So let's say that I want to market something and I
5 decide that I'm going to do it by violating the Telephone
6 Consumer Protection Act. I decide that that's what I'm going
7 to do, and I'm going to make as many calls as I possibly can,
8 millions and millions, until somebody shuts me down. Okay.

9 And I do that. And guess what? Just like the guy
10 who does a bribe and doesn't write a check that says in the
11 memo section "bribe," I don't keep records of the phone calls
12 that I make. And then, you know, people start showing up that
13 have gotten these calls who arguably have had their peace and
14 quiet violated and they file a lawsuit, and they say, well,
15 you know, these people were making millions and millions of
16 calls. We should all be able to sue in one group.

17 And then you come in and say -- or I come in as the
18 defendant and I say: Well, you can't do that because I didn't
19 keep records.

20 What is right about that? It just doesn't make sense
21 to me.

22 MR. O'MEARA: And because it is a hypothetical, but I
23 agree with you.

24 THE COURT: Well, that's basically the situation here
25 because Mr. DeJongh didn't keep records. And I recognize that

1 Mr. DeJongh isn't a defendant, but he was contracted with
2 somebody who contracted with somebody who was a defendant, and
3 that's the situation. He didn't keep records, shockingly,
4 seeing as how he was doing something illegal.

5 I mean, is basically the rule then is that only the
6 person who can testify that he's the recipient of the call can
7 sue individually?

8 MR. O'MEARA: To answer your question, I don't think
9 it is right that we don't have records. It's unfortunate, but
10 Mr. DeJongh was the owner, if you will, of the ESG defendants
11 who are defendants. And it is unfortunate, but we are faced
12 with that prospect now. And at least from the Berkley Group's
13 perspective who didn't have knowledge that these calls were
14 going on, now we are caught up in a class action litigation
15 and shouldn't be deprived of --

16 THE COURT: So when you say didn't have knowledge
17 that it was going on, just tell me where Berkley fits in, as
18 you see it.

19 MR. O'MEARA: Berkley contracted with VOMT to
20 provide --

21 THE COURT: With?

22 MR. O'MEARA: VOMT, Vacation Ownership Marketing
23 Tours.

24 -- contracted with them for marketing purposes.

25 THE COURT: What is Berkley's business?

1 MR. O'MEARA: Berkley is basically a time share
2 business.

3 THE COURT: Time share business. They contracted
4 with VOMT to do marketing for them.

5 MR. O'MEARA: Correct.

6 THE COURT: Then VOMT does what?

7 MR. O'MEARA: VOMT then contracts with CCL, Caribbean
8 Cruise Lines.

9 THE COURT: Right.

10 MR. O'MEARA: Caribbean Cruise Lines then had an
11 agreement with Mr. DeJongh. Mr. DeJongh then --

12 Actually -- the calls were actually made by an
13 individual name Darren Robb. His name came up once or twice
14 in the briefing. But those were the calls that were actually
15 made.

16 So where does Berkley fit in there? Yes, there was a
17 contract.

18 THE COURT: So basically when the calls were being
19 made by -- whether it was DeJongh or the guy working for
20 DeJongh, some of those calls may have been for Caribbean
21 Cruise Lines and some of them may have been for your time
22 shares?

23 MR. O'MEARA: No, none. There is no evidence -- and
24 the evidence does demonstrate that none of the calls, any of
25 them, had time share, The Berkley Group, anything --

1 THE COURT: When you say no evidence, you actually
2 mean no evidence?

3 MR. O'MEARA: I mean no evidence. There is no
4 evidence that any call was made.

5 THE COURT: So what were you guys paying for then?

6 MR. O'MEARA: What's that?

7 THE COURT: Did you get stiffed by the guy? Did you
8 sue him for stiffing you?

9 MR. O'MEARA: No, we didn't because we didn't know
10 that is how the marketing was going on.

11 THE COURT: So you made a contract with VOMT. You
12 paid them, right?

13 MR. O'MEARA: Yes.

14 THE COURT: What did you think they were doing?

15 MR. O'MEARA: Marketing for us in --

16 THE COURT: For what, though? What did you think
17 they were doing to market for you?

18 MR. O'MEARA: That would be up -- I mean, frankly, a
19 lot of that is proprietary.

20 THE COURT: But I'm asking you. So you don't want to
21 tell me?

22 MR. O'MEARA: No. It could have been either paper or
23 it could have been phone calls. We didn't know this
24 particular campaign was going.

25 THE COURT: How much did you pay him?

1 MR. O'MEARA: I don't know the full amount. What we
2 do pay --

3 THE COURT: Well, tell me the partial amount if you
4 don't know the full amount.

5 MR. O'MEARA: I honestly don't know that. What we
6 paid them for was any lead that we got, then we get a
7 commission from that lead, but we don't know where those
8 leads --

9 THE COURT: Did you ever get leads back from them?

10 MR. O'MEARA: Yes, we did, from various different --

11 THE COURT: So you were basically paying for leads
12 from VOMT and you paid for -- and if somebody bought a time
13 share, then they would get a commission on that, and you would
14 get whatever the revenue from the time share.

15 MR. O'MEARA: I actually think it was just from a
16 lead that we got.

17 THE COURT: A lead, okay.

18 You guys are over your time, but I will give you one
19 more minute.

20 MR. O'MEARA: No, that's fine, your Honor.

21 And just to our point, we think basically the Berkley
22 Group based on -- and to your point, it is unfortunate we
23 don't have the records, but Berkley Group's position in here
24 has never been something that we believe we should have been
25 dragged into. I know this is class certification, but that is

1 what we tried --

2 THE COURT: Thanks, Mr. O'Meara.

3 MR. O'MEARA: -- to demonstrate.

4 THE COURT: So acknowledging that maybe it's not an
5 ideal situation and, you know, depending upon one's definition
6 of fairness, you could say it's unfair, that somebody goes out
7 there and makes a whole bunch of -- does a whole bunch of bad
8 things and doesn't keep records of it. I mean, sometimes the
9 chips fall where they fall and life isn't fair. So you have
10 to be able to figure out who the class members are.

11 And so basically your solution is we just publish a
12 bunch of notices in a bunch of newspapers and rely on people
13 to submit affidavits: I got a call.

14 MR. RAUSCHER: That's part of the solution, your
15 Honor.

16 THE COURT: You know, the cases on ascertainability
17 seem to talk about objective criteria. Is there a case that
18 says that somebody saying, oh, yeah, I'm one of the people,
19 that that is objective criteria?

20 MR. RAUSCHER: Your Honor --

21 THE COURT: Say "yes" or "no" first.

22 MR. RAUSCHER: Yes.

23 THE COURT: Then tell me, all right.

24 MR. RAUSCHER: The Boundas case, B-o-u-n-d-a-s v.
25 Abercrombie, that Judge Feinerman decided, he said -- that was

1 a case about improperly -- allegedly improperly voiding gift
2 cards. He said if a class is defined as people who had a gift
3 card that was improperly voided and those people still have
4 the gift card, that is as objective as --

5 THE COURT: They would have something to show.
6 That's objective.

7 MR. RAUSCHER: That's the first part.

8 THE COURT: That's objective. Okay. So what's the
9 second part?

10 MR. RAUSCHER: The second part is, he said it is less
11 objective if they don't have their gift card, and a lot of
12 people would have discarded them, but we can use an affidavit
13 process to handle that part of it.

14 THE COURT: I don't know the extent to which Judge
15 Feinerman went into it, and I don't use a lot of gift cards
16 and I have never -- well, I'm not going to say I've never been
17 in an Abercrombie because I've bought people gift cards at
18 Abercrombie before. But if somebody once had a gift card at
19 Abercrombie and used it, okay, somewhere in the bowels of
20 Abercrombie and Fitch's servers, there would be a record that
21 that person bought something. So you would have something,
22 wouldn't you?

23 MR. RAUSCHER: I'm not sure that there would be a
24 record, and I'm certainly not sure that that record would tie
25 to the person who the gift card was for if they paid in cash.

1 There would be a record that a gift card was issued
2 presumably, but a lot of people presumably also paid in cash.
3 I don't think there would be a record of that, which I think
4 would be --

5 THE COURT: But if the people paid in cash, they
6 didn't have gift cards. Maybe I'm missing something.

7 MR. RAUSCHER: Someone could have given it as a gift.
8 I'm just thinking as a hypothetical.

9 THE COURT: In other words --

10 MR. RAUSCHER: If I buy a gift card for someone else
11 and I pay in cash.

12 THE COURT: So the plaintiffs were the people who had
13 bought the gift cards, not necessarily the people who had used
14 the gift cards. Sure, okay. I would have been the plaintiff,
15 not my daughter, in other words.

16 MR. RAUSCHER: I'm not sure technically who would
17 have been the plaintiff, but I think my point was if you could
18 have bought a gift card.

19 THE COURT: So why should I agree with Judge
20 Feinerman on that other than that he's really nice and very
21 smart?

22 MR. RAUSCHER: Well, one, because it doesn't reward
23 people.

24 THE COURT: That doesn't sound objective to me,
25 though.

1 MR. RAUSCHER: Your Honor, here there is more
2 evidence. There is more evidence just beyond affidavits.

3 THE COURT: What is it?

4 MR. RAUSCHER: In addition to the document that you
5 discussed earlier with the defendants.

6 THE COURT: That's the 174 or whatever?

7 MR. RAUSCHER: That's the 174 or so.

8 We have served subpoenas on additional carriers that
9 the defendants were using, and that's Caribbean Cruise Line
10 and their -- at least one so far has indicated they have six
11 months of call detail records, and that's going to be the same
12 type of incoming call.

13 THE COURT: So you have still got stuff coming in.

14 MR. RAUSCHER: We still have stuff coming in.

15 We just got an interrogatory response identifying
16 them, and so we served a subpoena.

17 We also have evidence in the hands of class members
18 in addition to them just saying so.

19 THE COURT: Like what would that be?

20 MR. RAUSCHER: You could have a voicemail if someone
21 would have saved it. You could presumably have a caller ID
22 record, and you could have people's telephone bills.

23 In one way you can look at a telephone bill.

24 THE COURT: See, here is the problem. Here is the
25 problem. And I know that I'm probably mushing together, you

1 know, ascertainability and superiority and a bunch of other
2 things, okay. But if you sort of hypothesize a situation
3 where we're going to rely on people's say-so, and maybe their
4 say-so is supported by something else, then aren't the
5 defendants going to be able -- aren't they entitled to go
6 challenge those people, and then don't you get down -- then
7 aren't you really into some sort of an individualized inquiry?

8 MR. RAUSCHER: I don't think the type of challenge
9 that we might face here would be enough of an individual
10 inquiry to take this out of the realm where class
11 certification would be appropriate. I'm not going to say the
12 defendants have no right to challenge anything, but certain of
13 those challenges we think can be made on a class-wide basis;
14 for example, whether all of the calls that ESG made had a free
15 cruise offer attached to it.

16 THE COURT: I'm not even talking about that. I'm
17 talking about just identifying recipients of calls. I'm still
18 at step one. I'm not at step four or whatever step that would
19 be. I'm just talking about identifying the people who got
20 calls.

21 I mean, I can see the notion of -- and I don't know
22 whether people ever define classes like this. I can see
23 saying, okay, I'm certifying a class of the people who got
24 calls who are reflected in exhibit whatever it is that
25 identifies.

1 MR. KANOVITZ: I'm sorry, Judge. Judge, I apologize.

2 THE COURT: Go ahead and finish talking to him. I
3 will start my sentence over. I want him to hear my question.

4 (Brief interruption.)

5 THE COURT: I can see -- I can hypothesize the idea
6 of certifying a class of people that says, okay, starting out
7 the definition the way you have, everybody who got calls as
8 reflected in the attached exhibit, and we would attach, you
9 know, the list of phone numbers or whatever. Beyond that,
10 we're relying on people's say-so, at least as things now
11 stand. I don't know what you're going to get from these other
12 people. But we're relying on people's say-so.

13 And I guess my concern is if we're relying on
14 people's say-so, unless your position is that their say-so is
15 gospel and it's not subject to inquiry, which would be hard to
16 imagine, then we're going to -- then there is going to have to
17 be some process to figure out, you know, whether the say-so is
18 good enough.

19 MR. RAUSCHER: That --

20 THE COURT: I mean, in the cases that you're talking
21 about -- I mean, in Judge Feinerman's case -- maybe they
22 haven't gotten far enough down the road. If somebody submits
23 an affidavit, is that the end of the story; they're in?

24 MR. RAUSCHER: He says that you can handle that as
25 part of the claims process. I know something similar was done

1 in the Household International Securities Litigation that
2 ended in a jury verdict, and the defendant still had the right
3 to rebut the presumption of fraud on the market in the
4 securities case.

5 But here, at least for some people, there is a way we
6 think that you can verify that they got the calls in a way
7 that defendants won't be able to rebut because --

8 THE COURT: What?

9 MR. RAUSCHER: -- they don't have -- the defendants
10 didn't keep records, and so that is, we know at least some
11 telephone numbers that ESG was using to make the calls. ESG
12 responded to government inquiries, and I think twice they sent
13 a letter to the Missouri attorney general's office
14 acknowledging that they used eight specific telephone numbers
15 to make the calls.

16 We served a subpoena on bandwidth.com, which is one
17 of the telephone companies that ESG subscribed or got numbers
18 that they subscribed to through. That company produced to us
19 a list of 57 numbers that ESG subscribed to and the dates for
20 each of the telephone numbers.

21 So if someone has a bill showing that they received a
22 call from that number during the relevant time period, we have
23 something that can be verified and the defendants aren't going
24 to be able to --

25 THE COURT: People still get bills that say who

1 called them?

2 MR. RAUSCHER: Absolutely. Our clients have turned
3 over bills. Maybe not everybody in the class for every single
4 call, but absolutely call detail records.

5 THE COURT: But how would I define the class then in
6 a way that would require somebody to submit some sort of
7 evidence and not just their say-so?

8 MR. RAUSCHER: Your Honor, we think that you could do
9 subclasses. We don't think that's an issue that should
10 prevent the overall --

11 THE COURT: The people who is say-so is sub class A,
12 the people who can prove it is subclass B?

13 MR. RAUSCHER: It may not be something you need to
14 redefine the class for, and it may be something that we see
15 how much class-wide evidence we have on certain numbers. But
16 you could do subclasses by telephone numbers, if that's what
17 it came down to, at a later date if we needed to adjust for
18 the fact that there are certain areas in which we can verify
19 for everybody and certain ones where we can't.

20 THE COURT: So what is the -- I was talking about
21 this list of 2 million, the calls that were forwarded by CCL.
22 Give me your take on how that fits in.

23 MR. RAUSCHER: My take is that is a subset of the
24 political --

25 THE COURT: Of what?

1 MR. RAUSCHER: Of the political calling campaign.

2 THE COURT: How do you know that, or what makes you
3 think that?

4 MR. RAUSCHER: That's what Jennifer Poole testified
5 to.

6 THE COURT: Jennifer?

7 MR. RAUSCHER: Jennifer Poole is the marketing
8 director. That's what she testified to. And there is also an
9 interrogatory response.

10 THE COURT: Do I have the interrogatory response?

11 MR. RAUSCHER: I'm almost certain that it's in there.
12 I would like to -- I can verify what it says.

13 THE COURT: Somebody else can verify while you're
14 talking. So it's a subset of the people who got political
15 calls.

16 MR. RAUSCHER: That's correct.

17 THE COURT: Allegedly --

18 MR. RAUSCHER: People who got the political -- right,
19 the alleged -- the calls that are part of this case.

20 THE COURT: Yes.

21 MR. RAUSCHER: A subset of that group and who were
22 transferred to Caribbean Cruise Line or one of its call
23 centers and who were on the phone for more than 30 seconds.

24 THE COURT: Okay. And the significance of the more
25 than 30 seconds, does that suggest that somebody actually had

1 a conversation of some sort, or at least a little bit of a
2 conversation?

3 MR. RAUSCHER: Yes, and I think that's actually how
4 they decided whether they needed to pay the lead broker for
5 the calls.

6 THE COURT: Oh. Is that in something that I have
7 here?

8 MR. RAUSCHER: I'd like to verify that.

9 THE COURT: The trigger for payment, in other words?

10 MR. RAUSCHER: It's in her testimony. I would have
11 to check it.

12 THE COURT: Wait a second. Wait, wait, wait. So in
13 order to get paid, somebody would have to show that they kept
14 somebody on the phone for 30 seconds.

15 MR. RAUSCHER: No, because the payment that I'm
16 talking about is the payment that Caribbean made to the lead
17 broker. They were doing a per call --

18 THE COURT: Who is the lead broker?

19 MR. RAUSCHER: The lead broker is a guy named Scott
20 Broomfield, who at least allegedly stood in the middle of
21 Jacob DeJongh, his cousin, and Caribbean Cruise Line.

22 THE COURT: Okay. But I guess what I am getting at
23 is how would anybody know? I'm just sort of groping as to
24 whether there is some other evidence out there. How would
25 anybody know that he was on the phone for more than

1 30 seconds?

2 MR. RAUSCHER: So people might know they were on the
3 phone for more than 30 seconds. Again, they may --

4 THE COURT: Maybe I misunderstood you. I thought
5 what you were telling me is that there was a trigger for
6 payment and the trigger for payment is if the call lasted 30
7 seconds or more.

8 MR. RAUSCHER: That's right. Are you asking how did
9 Caribbean know that?

10 THE COURT: In other words, if I'm the guy who, in
11 order to get paid, has to keep somebody on the phone for 30
12 seconds or more, how do I prove to the guy that's paying me
13 that I kept somebody on the phone for 30 seconds?

14 MR. RAUSCHER: We don't know exactly mechanically how
15 that worked, but we know that --

16 THE COURT: Have you taken the depositions of those
17 people?

18 MR. RAUSCHER: We have not spoken to that person yet,
19 but we talked to Mr. DeJongh who didn't remember much of the
20 technical details.

21 THE COURT: Yes.

22 MR. RAUSCHER: When we asked Caribbean all these
23 questions, they were on one side of it, and I don't think we
24 got any clear evidence on that.

25 THE COURT: Okay. You have a couple of minutes here.

1 MR. RAUSCHER: A couple other things I just wanted to
2 touch on. One, with respect to Berkley's role in this, every
3 call was designed to sell a free cruise and a Berkley time
4 share. So the fact that they weren't mentioned on every call
5 we don't think in any way affects --

6 THE COURT: Why do you say that every call was
7 designed to sell both?

8 MR. RAUSCHER: Because we have evidence that there
9 were, so there was a free cruise attached to every call. I
10 know defendants dispute that, but the ESG defendants have
11 admitted to the FTC and to multiple state attorney generals
12 that every call had a free cruise offer attached to it.

13 We deposed the founder of Caribbean Cruise Line who
14 said, we tried to up-sell a vacation package to everybody who
15 answered and talked to us. And the up-sell on the vacation
16 package includes a mandatory -- if you buy one, it includes a
17 mandatory time share presentation.

18 And if they didn't buy the up-sell, they tried to
19 push them on the time share or try to sell them on a time
20 share later. We think the evidence strongly supports the idea
21 that every call was designed to sell Caribbean's vacation
22 packages and Berkley's time share.

23 In any event, we think that's a merits inquiry that
24 doesn't need to be decided now.

25 THE COURT: Okay. So should I be -- so what is

1 the -- what do you have out there as far as subpoenas to phone
2 companies and whatnot?

3 MR. RAUSCHER: Well, we have -- I think we served
4 three fairly recently. We got a response from one company
5 saying we have six months of call detail records.

6 THE COURT: And they're preserving them presumably.

7 MR. RAUSCHER: They're preserved. They're archived,
8 so it's going to cost money to -- and we're going to have to
9 talk to defendants about, I think, who should be responsible
10 for that.

11 THE COURT: That's one. How many others do you have?

12 MR. RAUSCHER: That's one. We have another one out
13 there to Sprint, and that one has multiple -- that one has
14 most of the telephone numbers -- many of the telephone numbers
15 that they have identified. We don't have a response on that
16 yet.

17 THE COURT: And what do you think the records --

18 Let's just talk about the first company that has six
19 months of records. What are those records going to show? Are
20 they going to show the records -- are they going to show the
21 numbers that were called from those phone numbers, as you
22 understand it?

23 MR. RAUSCHER: I think it will show the same type of
24 information that we have. It will also show the numbers of
25 the people who received the calls at least. We have not seen

1 the records but --

2 THE COURT: The number of the recipients of the
3 calls.

4 MR. RAUSCHER: The number of recipients.

5 THE COURT: It would be like my long distance phone
6 records and it shows that I called somebody in New York at
7 such and such a phone number.

8 MR. RAUSCHER: That's our understanding.

9 THE COURT: Okay.

10 MR. RAUSCHER: At least that.

11 THE COURT: So should I be -- shouldn't I be waiting
12 then until that whole process gets run out?

13 MR. RAUSCHER: We don't think you need to wait for
14 that, your Honor.

15 THE COURT: What if I want to?

16 MR. RAUSCHER: I think that's certainly a reasonable
17 approach.

18 THE COURT: I mean, because there's this big brouhaha
19 about, you know, the alleged absence of objective evidence,
20 and if there is more objective evidence that's just sitting
21 out there waiting for somebody to pay to dredge it up, then, I
22 mean, to me that's pretty darned close to a no-brainer that I
23 wait for that because, I mean, just think of the opposite
24 scenario. Okay.

25 So one of three things is going to happen. Either

1 I'm going to say class certification is denied because it's
2 not ascertainable and you're going to come back to me in three
3 months and say, wait a second, Judge, here it is, we got it,
4 and I'm going to have to do this all over again.

5 Scenario two is I grant class certification. It gets
6 appealed, and while it's on appeal, the stuff comes in, and so
7 then the Court of Appeals is working off, you know, some
8 partial record.

9 I don't know what the third scenario is. It doesn't
10 make sense to me. If there is something other --

11 Why is it just now that you're subpoenaing these
12 things? Is it something about an interrogatory answer?

13 MR. RAUSCHER: We had issued an interrogatory asking
14 who did you -- which telephone service providers did you use
15 to take incoming calls?

16 THE COURT: When did you get the answer to that?

17 MR. RAUSCHER: We got it -- it was part of the
18 motion. It was very recent. They served it after the motion
19 to stay was denied.

20 THE COURT: Okay, okay, okay. Then you sent out the
21 subpoenas you have been dealing with, okay.

22 You're out of time, but I will give you one minute.

23 (Brief interruption.)

24 MR. RAUSCHER: Your Honor, someone just brought me
25 the citation to Ms. Poole's deposition testimony about the

1 list of 2 million people. It's Exhibit 12. It looks like
2 it's Exhibit 12 to our class certification brief.

3 THE COURT: Okay, I will find it.

4 MR. RAUSCHER: She says: We're looking at the list.
5 It's 1,945,866 total calls.

6 And I said:

7 "Question: "That's the total number of calls that were
8 transferred to Caribbean Cruise Line as a result of political
9 surveys?" And she says "correct."

10 THE COURT: Okay, thanks.

11 So I have two questions for you. I have two
12 questions for somebody who is actually going to answer my
13 question and not talk about other stuff. So if you can deal
14 with that, Mr. Epstein, then you can be that person; otherwise
15 delegate somebody else. Are we clear?

16 MR. EPSTEIN: We are.

17 THE COURT: Okay. So do you want to say anything
18 about the reference to Ms. Poole's testimony?

19 MR. EPSTEIN: Ms. Poole -- yes.

20 Ms. Poole testified that there were other call
21 programs that were being conducted at the same time by call
22 centers other than Mr. DeJongh.

23 THE COURT: So what you're going to tell me is that
24 maybe it's a political survey, but it's not necessarily your
25 political survey.

1 MR. EPSTEIN: It is not Mr. DeJongh's political
2 survey.

3 THE COURT: Okay.

4 MR. EPSTEIN: There were other companies like Mr.
5 -- were not like Mr. DeJongh but other companies doing what
6 Mr. DeJongh had done.

7 THE COURT: I get it.

8 MR. EPSTEIN: Okay.

9 THE COURT: The second question is this whole thing
10 about why shouldn't I wait and see what comes in from these
11 subpoenas.

12 MR. EPSTEIN: Well, that dovetails in with our point
13 is that we don't have the ability to identify who the class
14 members are other than that very small subset where we can
15 actually trace the numbers. If there is an ability to trace
16 the numbers, then the numbers become -- or the people become
17 more ascertainable.

18 THE COURT: Okay.

19 MR. EPSTEIN: If you were to certify a class today
20 addressing your --

21 THE COURT: Yeah, yeah.

22 MR. EPSTEIN: -- scenario number two, we would almost
23 certainly have to take review on that.

24 THE COURT: Of course you would, right.

25 MR. EPSTEIN: And all of a sudden evidence is coming

1 in.

2 THE COURT: It's crazy. I mean, the Court of Appeals
3 would say: Why did you do this now, Kennelly? You should
4 have waited until everything came in.

5 MR. EPSTEIN: And, your Honor, with due respect, it
6 kind of dovetails with what I was addressing, and that is the
7 status of the motion as it sits today, the motion is not
8 supported by that evidence.

9 THE COURT: Well, you know what, the motion got filed
10 when it did because I put a deadline on it, okay. That is the
11 fact. I put a deadline on it. That's why it got filed,
12 right?

13 MR. EPSTEIN: Yes.

14 THE COURT: You filed --

15 Did I set a deadline? Maybe I didn't set a deadline.

16 MR. EPSTEIN: You did.

17 THE COURT: I set a deadline. So that's why it got
18 filed. Maybe I screwed up. Maybe I set the wrong deadline.
19 Maybe it didn't dawn on me that there was other evidence that
20 had to be gathered. So that wouldn't be on them; that would
21 be on me, I think, just under any reasonable way of looking at
22 it. So I'm going to have to think about that.

23 MR. EPSTEIN: We don't disagree with that point at
24 all, your Honor.

25 THE COURT: I may end up just kind of putting the

1 brakes on this for a while, but I guess here's what I'd like
2 to get, if you can do this. If I can get a status report,
3 let's say, by Tuesday, it doesn't have to be anything very
4 elaborate -- it can be from the plaintiffs -- that basically
5 says: Here's the subpoenas we have out there. Here's what
6 they're for. You can attach them if you want. Here's what
7 they're for and here's the status of what we're getting on
8 each one of these or what we think we're getting or where our
9 discussions are and so on.

10 If you can file some --

11 I don't want more -- no argument on the class
12 certification motion. I just want the status of the
13 subpoenas. If you have anything to say on the defense side
14 about the status of the subpoenas after they file their thing
15 on the 11th of March, then you can file something by the 13th
16 of March, and I will wait until after I get both of those to
17 figure out whether to put the brakes on or not.

18 MR. EPSTEIN: Just one word to sort of clarify I
19 think what I heard counsel say. If they were sending
20 subpoenas to the companies that Caribbean uses, I'm not sure
21 it's going to reveal the information he's suggesting. If they
22 found the ones that Mr. DeJongh was using, it may do that.

23 THE COURT: Well, maybe I will find this out when you
24 guys submit something.

25 MR. EPSTEIN: That's what we will find out because

1 I'm not sure as we sit here.

2 THE COURT: Thanks. Take care.

3 MR. RAUSCHER: Thank you, your Honor.

4 THE COURT: All right.

5

6

7 (Which were all the proceedings had in the above-entitled
8 cause on the day and date aforesaid.)

9

10 C E R T I F I C A T E

11

12 I hereby certify that the foregoing is a true and
13 correct transcript of the above-entitled matter.

14

15

16 /s/ *Laura M. Brennan*

March 14, 2014

17

18

19 _____
Laura M. Brennan
Official Court Reporter
Northern District of Illinois

Date

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